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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JOHN AND DOROTHY ARRINGTON,

Petitioners,

vs.

JIM MATTOX, ATTORNEY GENERAL OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTIONS PRESENTED

The Texas Open Beaches Act creates an enforcement mechanism by which the State's Attorney General may compel landowners along the Texas Gulf Coast to recognize easements imposed across their property and to remove all structures that may fall within the boundaries of that easement.

The question presented is:

1. Whether the Texas Open Beaches Act is subject to the constraints of the Fifth Amendment's takings clause.

LIST OF PARTIES

The parties to the proceedings below were the same as those before this Court. John and Dorothy Arrington were appellants in the Court of Appeals; Jim Mattox, the Texas Attorney General, was the appellee.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

The Petitioners, John and Dorothy Arrington, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Third Supreme Judicial District of Texas, entered in those proceedings on March 29, 1989.

OPINION BELOW

The opinion of the Third Court of Appeals is reported at 767 S.W.2d 957 (Tex.App. – Austin 1989, writ denied).

JURISDICTION

Under the Texas Open Beaches Act, Sec. 61.001 – 61.024,[1] TEX.NAT.RES.CODE, the respondent brought suit against the petitioners to enforce an easement over the petitioners' property. Summary judgment relief was granted respondent by the trial court, the 53rd District Court of Travis County, Texas, Judge Harley Clark, presiding.

Appeal was taken to the Court of Appeals for the Third Supreme Judicial District which affirmed the decision of the district court on March 29, 1989. That decision is reported as *Arrington v. Mattox* at 767 S.W.2d 957 (Tex.App.– Austin 1989, writ denied). Petitioners filed an application for writ of error in the Texas Supreme Court which was rejected by that court with the notation writ denied on September 6, 1989.

Jurisdiction in this Court is sought based upon 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in relevant part:

> No person shall be held . . . ; nor shall private property be taken for public use, without just compensation.

[1] At the time this lawsuit arose, the Open Beaches Act was codified at Secs. 61.001 through 61.024; Sec. 61.025 has now been added.

STATEMENT OF THE CASE

Petitioners have lived along the Texas Coast for a number of years. The home and lot they own borders the Gulf of Mexico; it is located near Galveston, Texas. The land and home had been owned for a number of years prior to August, 1983. In August, 1983, Hurricane Alicia struck Galveston Island and moved the natural vegetation line to a point landward of Petitioner's property.[2] Petitioners took certain steps to protect their property from further erosion, including the construction of a wooden bulkhead or retaining wall on the beach in front of their home, the construction of a chain link fence with a locked gate on top of that wall, the placement of sand on either side of the wall, and the placement of pieces of concrete, vegetation, a wooden boardwalk, and numerous Christmas trees. All of these steps were designed to facilitate the natural process by which a sand dune is built. The land upon which these items were constructed was landward of the vegetation line prior to the hurricane and the State had never expressed any interest in imposing the easement upon the property prior to August, 1983.

Respondent filed a suit, pursuant to the Open Beaches Act, seeking to enforce the public's easement across Petitioners' property. One of the defenses raised by Petitioner was that the action of the Respondent constituted a "taking" of his property in violation of the Fifth Amendment. The trial court rejected this defense and granted Respondent's Motion for Summary Judgment.

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[2] The vegetation line is defined statutorily as the "extreme seaward boundary of natural vegetation which spreads continuously inland." Sec. 61.001(2). TEX.NAT.RES.CODE.

767 S.W.2d at 958. The trial court ordered Petitioners to remove all of the items placed on the easement and enjoined them from any further activity that might interfere with the public easement. In addition, petitioners were ordered to pay a fifty dollar fine.

On appeal to the court of appeals, Petitioner's sole issue was that the action of the respondent violated the Fifth Amendment. The court of appeals held that there was "a fundamental distinction between a governmental taking of an easement through an act of sovereignty and judicial recognition of a common law easement acquired through historical public use."

> The Open Beaches Act does not empower the Attorney General to take rights from an owner of land, but merely furnishes a means for the public to enforce its existing collective rights.

Id. at 958.

The Supreme Court of Texas denied review on September 6, 1989.

Historical Development of the Open Beaches Act

The Texas Open Beaches Act, TEX.NAT.RES.CODE Secs. 61.001 et seq., was first construed in *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ.App. 1964 writ ref'd n.r.e.). There, the Court of Appeals held that the Act declared it to be the public policy of Texas that:

> the people of the State should have the free and unrestricted right of ingress and egress to and from the *State-owned* beaches bordering on the seaward shore of the Gulf of Mexico or such larger area extending from the line of mean low

> tide to the line of vegetation *in the event the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of continued right in the public.* The Article made it an offense against public policy for anyone to obstruct the way of ingress and egress or the use of the beaches. The Attorney General of Texas, a County, District, or Criminal District Attorney were given authority to bring suits on behalf of the people of Texas, and it was made their duty to do so, to require removal of any obstructions that may interfere with such right of ingress and egress.

375 S.W.2d at 925-26. (emphasis in original).

The *Seaway* court defined the beach as that area between the line of mean low tide and the seaward side of the vegetation line. The line of vegetation was defined in the Open Beaches Act, (then Art. 5415d, V.A.C.S.), – "the extreme seaward boundary of natural vegetation which spread continuously inland."[3]

The court found the Act constitutional, because other than the definitions of "beach" and "line of vegetation", the statute was used only as an enforcement mechanism. While the statute created certain presumptions, they were

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[3] The Court noted that the appellants had argued that the beach was only the area between mean low tide and mean high tide under common law. 375 S.W.2d at 928. Nevertheless, the Court adopted the statutory definition as controlling. See 375 S.W.2d at 930.

not used in *Seaway*, according to the court.[4] 375 S.W.2d at 930.[5]

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[4] The presumption was Section 2 of the Act as it existed then. Art. 5154d, Sec. 2, V.A.C.S. Where property was shown to be between the line of mean low tide and the line of vegetation, the title owner did not have the right to exclude the public from using the area and "there has been imposed upon the area subject to the proof of easement a prescriptive right or easement in favor of the public for ingress and egress to the sea." The presumption is now found at Sec. 61.020, TEX.NAT.RES.CODE.

[5] The Court described the beach as flat and smooth with a width of several hundred feet between the line of mean low tide and the line of vegetation. The line of mean high tide did not reach the vegetation line. 375 S.W.2d at 930. The tides, on occasion, reached the line of vegetation.

> As we understand it, the absence of vegetation is caused largely by the fact that the salty waters of the sea cover the area with frequency that suffices to prevent growth of vegetation. When we speak of high water and high tides we are not referring to height produced by storms. As a matter of fact, high waters produced by storms inundate the upland far above the vegetation line. However, these storm-produced high waters do not occur with such frequency and do not remain on the vegetation line sufficiently long to destroy it or the identifiable line it forms along the beach.

. . . .

> There is testimony that the beach and line of vegetation are stable and that this beach and vegetation line are two hundred or more years old. This is the testimony of experts. Some laymen familiar for many years with these features, based on their observation, confirm the experts as to the stability of the beach

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The court then found the evidence sufficient to sustain the judgment on the theory that the beach had been dedicated by the predecessors in title.

In *Matcha v. Mattox*, 711 S.W.2d 95 (Tex.App. – Austin, 1986 writ ref'd. n.r.e.; cert. denied), the State pleaded, not a stable vegetation line, as in *Seaway*, but a migratory one creating a moving public easement. The Court agreed that such an easement was permitted. This was the first case to construe a post-Alicia case. In *Feinman v. State*, 717 S.W.2d 106 (Tex.App. – Houston [1st], 1986 writ ref'd n.r.e.), the second post-Alicia case, the Court found that the State was proceeding under the Open Beaches Act, that the easement was imposed under that statute, and

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> and line of vegetation. There is testimony that while there is, particularly from storms, some erosion on the beach and at points on the vegetation line, such is temporary and the beach and the line of vegetation through the work of nature rebuild in relatively short times. The waters and winds rebuild the beach with sand and the vegetation grows from roots that are shown by the testimony not to be destroyed by storms. The vegetation line effectively marks the sandy beach from the upland which is covered by a continuous spread of vegetation inland.

375 S.W.2d at 931. The *Seaway* Appellants argued that erosion on the beach changed the location of the various boundaries. The Court found sufficient evidence to support the jury's findings of no net erosion and that the beach was the same as ever. " . . . we think the evidence clearly shows the line of vegetation has remained the same for at least two hundred years." 375 S.W.2d at 939. Thus the use of the vegetation line as a boundary was not void for vagueness because it was a well defined and stable physical feature. Id. See also *Moody v. White*, 593 S.W.2d 372 (Tex.Civ.App. – Corpus Christi, 1979).

that the statute contemplated a rolling easement. 717 S.W.2d at 108-09. Finally, in the instant case, the Court again sustained a constitutional challenge to the Open Beaches Act, holding that the State was not imposing an easement but merely seeking an adjudication of the public's rights.

REASONS FOR GRANTING THE WRIT

1. The Texas Courts' adoption of an easement theory under which no takings analysis is required is in direct contradiction to prior opinions of this Court.

The opinion of the Texas Court contradicted both prior holdings of this Court and holdings of the various federal Courts of Appeals when it held that the action was not one of sovereign action but one of the public asserting rights it had long held. "Takings" litigation is not limited to those governmental actions that result in expropriation of property for governmental use; it also applies when the governmental action deprives a private party of his property for public use. Public use turns on the actual purpose for which the property is taken and not on the identity of the operator. *Fourtnoy v. MARTA*, 678 F.2d 1038 (11th Cir. 1983), citing *LacCourte v. FRC*, 510 F.2d 198, 207, n. 36 (DC Cir. 1975).

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982), the Court quoted from Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1184 (1967):

> The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, *or the public at large*, 'regularly use' or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership. (emphasis added).

102 S.Ct. at 3171, fn. 5. The Court later noted the following:

> The City of New York and the opinion of the Court of Appeals place great emphasis on *Penn Central's* [*Penn Central Transportation Co. v. New York City*, 98 S.Ct. 2646 (1978)] reference to a physical invasion "by government", (citation omitted) and argue that a similar invasion by a private party should be treated differently. We disagree. A permanent physical occupation *authorized by state law* is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.

102 S.Ct. at 3174, fn. 9.[6]

In the case at bar, the petitioners' taking claim satisfies both arguments set forth above: their property is being put to public use and the principal enforcement

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[6] In *Loretto*, neither of the parties was a state agency; instead, the plaintiff/landlord argued that a state statute which permitted Cable TV Companies to run access lines down the sides of apartment buildings constituted a taking under the Fifth Amendment; this Court agreed. When the nature of the governmental action is a permanent physical occupation of property, this Court's cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. 102 S.Ct. at 3175.

mechanism is a state statute enforced by the Texas Attorney General. As *Seaway* noted, the State did not rely on a common law theory of beach but the statutory definition. See now TEX.NAT.RES.CODE. ANN. Sec. 61.014. The concept of vegetation line is also a product of statutory creation. See footnote 2, supra. The Attorney General has always admitted that he brought his enforcement actions as Attorney General pursuant to the Open Beaches Act, TEX.NAT.RES.CODE Secs. 61.001 et seq. That is the only statute that permits enforcement of the public easement. Thus, it is clear that the governmental action requirement is satisfied and that a takings analysis must be applied. See *Penn Central* supra, (the reviewing court must examine the nature of the government action to determine whether it is a taking; such a taking can be more easily found if the property interference is a physical invasion by government. 96 S.Ct. at 2659).

This analysis is consistent with state action analysis in the context of other constitutional issues. In *Ginn v. Mathews*, 539 F.2d 477 (9th Cir. 1976), the court held that where the state acts directly or even indirectly and its influence is strong, constitutional restraints must be observed. In *Jeffires v. Georgia Residential Finance Authority*, 678 F.2d 919 (11th Cir. 1982), the Court held that if the government affirmatively facilitates, encourages, or authorizes the objectionable practice, it is state action for purposes of the Fifth Amendment. In *Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340, 1345 (1988), the Court held that when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. In the case at bar, that is clearly satisfied when the Texas Attorney General seeks

to use the enforcement mechanism of a state statute to convert what was formerly privately owned land to public use.

Additionally, the Texas Courts erred when they held that a Fifth Amendment analysis was not required because the State made no use of the statute's presumption but merely relied upon the statute's definitions. The statute altered the rights of the various parties from their position at common law. Because the land in question was originally deeded after the Republic of Texas adopted common law, it is to the common law, rather than the Spanish civil law, the Court must look for its answer. See and compare *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex.Civ.App. – Houston, 1964 writ ref'd n.r.e.) with *Luttes v. State*, 324 S.W.2d 167 (Tex. 1958). At common law, the extent of the State's easement was determined by the line of mean high tide. *Seaway, supra.*

Traditionally, at common law, the public beach or shore was defined as the area between the lines of mean low and mean high tides.[7] In *Dincans v. Keeran*, 192 S.W.2d 603 (Tex.Civ.App. – San Antonio 1917), the plaintiffs sued defendants for trespass because of their camping along the shore line of the navigable stream.[8] The trial

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[7] Mean high tide was accepted as the landward boundary of the tidelands, at common law, in *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 56 S.Ct. 23 (1935). Mean high tide was defined as the average height of all the high waters at that place over a considerable time period, established at 18.6 years. 296 U.S. at 26-7.

[8] Because the original title in this case passed in 1833, prior to the adoption of the common law, civil law controlled

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court had ordered the appellants not to trespass within the appellee's pasture inclosure which included the land between the low and high tide. See also *Hynes v. Packard*, 45 S.W. 562. The Court of Civil Appeals held that both parties enjoyed coequal rights with the other. Neither could enjoin the reasonable use of the shore by the other. The Court found that hunting, camping, and fishing were reasonable uses of the shore line, and the State had no power to convey an exclusive right to the shore line to any private party. Id. at 605. The trespass judgment as to the other lands was upheld.

Thus, whether at common law or at civil law, the State recognized the public shore or easement as either the area between the line of mean low and mean high tide or the area between the low and the highest tide.

The Open Beaches Act altered that common law definition by permitting the Attorney General to enforce an easement created across the sand by prescription, common use, etc. up to the line of vegetation. See *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex.Civ.App. – Houston, 1964 writ ref'd n.r.e.). The Court rejected the argument that the land was granted to private owners impressed with a potential easement:

> We do not know that we clearly comprehend the appellee's position that the judgment can be upheld on the theory that the use of the beach by the public has become a part of our tradition

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and, therefore, the boundary was the line marked by the highest tide of the navigable waters, which were affected by the ebb and flow of the tide from the Gulf of Mexico through intervening bays. 192 S.W.2d at 604.

> and common law and the easement exists by reason of continuous right in the public. We suppose they seek to have us hold that the seashore is held in trust by the sovereign at common law for the people and to enjoy it there must be a means of egress and ingress to enable them to enjoy such use and therefore the sovereign has no power to cut off convenient access. We know of no such rule of law. In our extensive research we have found no cases so holding nor have any been cited us. In some cases the expression is used that the sovereign holds the seashore for use by the members of the public. We think this is true but this is far from holding that grants by the sovereign of land above the seashore are impressed by implication with a reserved easement in favor of the public to furnish access by land to the shore.

375 S.W.2d at 929. Thus, the lands in question were not subject to the implied reversion of the public trust of their predecessors in title, the original grantee.

The Court, in *Seaway*, noted that the appellants had argued that the beach was only the area between mean low tide and mean high tide under common law. 375 S.W.2d at 928. Nevertheless, the Court adopted the statutory definition, all property up to the vegetation line, see TEX.NAT.RES.CODE. ANN. Sec. 61.014., as controlling. See 375 S.W.2d at 930.

Additionally, common law easements in Texas typically do not mandate in every case the removal of all obstructions. They require only that the holder of the dominant estate be not unreasonably impeded or obstructed in the use and enjoyment of his easement. See ***Arden v. Boone,*** 221 S.W. 265 (Tex.Com.App. 1920); *Gillett* ***v. Van Horne,*** 36 S.W.2d 305 (Tex.Civ.App. – El Paso, 1931

error dismissed). Under the Open Beaches Act, however, all obstructions and impediments must be removed without any inquiry as to whether the public's use is unreasonably impeded. Sec. 61.011, TEX.NAT.RES.CODE, mandates that the public shall have free and unrestricted access to the public beach. Sec. 61.013, TEX.NAT.RES.CODE makes it an offense against public policy for a person to create or construct *any* obstruction, barrier, or restraint. Thus, the terms of the Open Beaches Act again substantially modified the rights of both the public and the landowners as they existed prior to its enactment.[9]

What is clear from this discussion is that the Open Beaches Act has altered the property rights of owners of beachfront property. Prior to the Open Beaches Act, landowners had the power to exclude the public from all shore areas except between the lines of mean low and mean high tides. See *Dincans, supra.* By this alteration and creation of an enforcement mechanism in the Attorney General's office, the Fifth Amendment takings clause is violated.[10] It is the statute's own terms that give rise to its operation and enforcement.

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[9] In the case at bar, petitioners introduced, as part of their summary judgment evidence, a survey, prepared by a Galveston County surveyor, Andrew Johnson, demonstrating that there was more than two hundred feet of beach between the dunes and other items constructed by the petitioners and the line of mean low tide.

[10] Even if, as recognized in *Seaway*, the public could acquire its easement by common law methods, such a

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Further, the use of the rolling easement concept, in and of itself, violates the takings clause. Prior to August, 1983, the public easement and the plaintiffs property existed side by side in relative harmony. The arrival of Hurricane Alicia in August, 1983 altered the boundary of the public easement, the vegetation line, and moved it over "on top of" plaintiffs' property. Thus, their property became subject to the public easement, not by governmental action, but by a sudden force of nature. This, according to the court below, was sufficient to take it outside the scope of the Takings Clause.

In *Kaiser Aetna v. United States*, 100 S.Ct. 383 (1979), this Court held otherwise. Kuapa Pond, in Hawaii, owned by the petitioners there, was a shallow lagoon separated from the bay and Pacific Ocean by a barrier beach. It was privately owned. Petitioners converted the pond into a marina and, by connecting it to the bay where, according to the U.S., it became subject to the navigational servitude of the Federal Government. Thus, the public had a right of access to what was formerly a

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prescription, etc., without violating the constitution, those theories would not apply to the petitioners. The State has made no effort, nor can it make any plausible showing, that prescription, etc. has ever operated upon the petitioners' property. The State's theory is that once the vegetation line is established as the boundary of the easement, it becomes the boundary wherever it goes. Landowners who, suddenly, find their property seaward of that line, as in the case of a hurricane or storm, can be compelled to tear down their property so that the easement creating forces can then operate. By this placement of the proverbial cart before the horse, the Fifth Amendment is violated.

private pond. Prior to the government's enforcement of its navigational servitude, the Kaiser-Aetna excluded the public from the marina. The Government contended that the public could not be so excluded because the public enjoyed a federally protected right of navigation over the navigable waters of the United States. 100 S.Ct. at 387. The source of this servitude was an inherent sovereign power of the Commerce Clause. That it was once fast land made no difference; when Kaiser Aetna made it navigable, the navigational servitude went with that expansion.

This Court did not question the power of the Government to enforce the navigational servitude as part of its Commerce Clause power; whether that amounts to a taking was and is a different issue. 100 S.Ct. at 390. The Court held that the attempt to create public access to the pond amounted to a taking. The Court found it clear that prior to the dredging by Kaiser Aetna, the pond was incapable of being navigable and had always been considered private property. Thus, it could not be argued that the land now subject to the easement was part of the prior "great navigable stream" previously recognized by the Court. Id. The imposition of the servitude amounted to a physical invasion of the property for which the government must pay just compensation. 100 S.Ct. at 393.

Similarly, in the case at bar, plaintiffs' property was not part of the public beach prior to Hurricane Alicia. Thus, it was not subject to the type of "easement creating forces" the Court found so persuasive in *Seaway*, supra.[11]

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[11] There was no evidence that anyone had camped on plaintiffs' property, ever walked on it, parked on it, etc. The

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What subjected petitioners' property to the easement was the sudden shifting in the easement boundary, the vegetation line, at the "hands" of Alicia. The imposition of the already existing public easement onto petitioners' property constitutes a taking in the same manner that the imposition of the navigational servitude over Kaiser Aetna's pond constituted taking in that case.

Finally, it is clear that the imposition of an easement is a taking even if it is de minimis. It is nothing more than a physical invasion of the property. See *Lorretto v. Manhattan CATV*, supra; *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987).[12]

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only evidence was that, just as in every open beach case, the public had used the beach up to the line of vegetation.

[12] Under *Nollan*, there is no doubt that the conduct is a taking:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, (as Justice Brennan contends) "a mere restriction on its use," (citation omitted), is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such

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2. The adoption of the easement theory is in conflict with the appellate decisions of some of the sister states

The rights of the public and the rights of property owners are not in irremediable conflict. In *Mathews v. Bay Head Improvement Assoc.*, 471 A.2d 355 (N.J. 1984), the New Jersey Supreme Court was confronted with a similar problem. Recognizing the public's right to use municipally owned dry beaches, the issue before them was the public's right to use privately owned dry beaches.[13] 471 A.2d. at 363. The Court held that both interests must be accommodated:

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> interests, so long as it pays for them. (citation omitted). *Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it,* but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' . . . We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and from, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

107 S.Ct. at 3145. (emphasis added).

[13] Dry beach in New Jersey is defined as that area landward of the line of mean high tide up to the vegetation line, or, if no vegetation line, to a seawall, road, parking lot, or boardwalk. 471 A.2d at 358, fn. 1.

> Exercise of the public's right to swim and bath below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.

471 A.2d. at 364. The Court rejected the concept of prescription; "[a]rchaic judicial responses are not an answer to a modern social problem." Id. at 365. The solution in each case had to depend upon a balancing of the rights of the parties, both private and public, to accommodate both interests. Id.

Thus, courts of two states have analyzed the same problem and reached contradictory constitutional results.

Because the Open Beaches Act does not allow for such flexibility, but impels the destruction of the plaintiff's private property rights, it is unconstitutional.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted. Petitioners respectfully pray that this Court grant their Petition, set this case for full briefing on the merits and oral argument and, upon final consideration grant them their requested relief.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

JUDGMENT RENDERED MARCH 29, 1989

NO. 3-88-086-CV

JOHN ARRINGTON, ET UX. V. HONORABLE JIM MATTOX, ATTORNEY GENERAL OF TEXAS, ON BEHALF OF THE PEOPLE OF TEXAS APPEAL FROM 53RD DISTRICT COURT OF TRAVIS COUNTY BEFORE CHIEF JUSTICE SHANNON, JUSTICES CARROLL AND ABOUSSIE AFFIRMED – OPINION BY JUSTICE ABOUSSIE

THIS CAUSE came to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that the appellants, John Arrington and Wife Dorothy Arrington, as principles, and Lawyers Surety Corporation, as surety on the appeal bond herein, pay all costs of this appeal; and that this decision be certified below for observance.

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

NO. 3-88-086-CV

JOHN ARRINGTON, ET UX.,
APPELLANTS

vs.

HONORABLE JIM MATTOX, ATTORNEY GENEARL OF TEXAS, ON BEHALF OF THE PEOPLE OF TEXAS,
APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
53RD JUDICIAL DISTRICT NO. 353,498,
HONORABLE HARLEY CLARK, JUDGE PRESIDING

Appellants John and Dorothy Arrington appeal the granting of a summary judgment by a district court of Travis County in an "open beaches" suit. *See* Tex. Nat. Res. Code Ann. §§ 61.001-61.025 (1978 & Supp. 1989) (the Open Beaches Act). The judgment prohibits appellants from interfering with the public's right of free access over the beach adjacent to their property which is seaward of the natural vegetation line. We will affirm the judgment.

Appellants own a lot and home facing the Gulf of Mexico in the Bermuda Beach subdivision on West Beach, Galveston Island, Texas. In August 1983, Hurricane Alicia struck the Texas coast and moved the vegetation line to a point landward of appellants' property. Appellants then built a wooden bulkhead or retaining wall on the beach in front of their home. They erected a chain link fence and locked gate on top of the wall and placed sand fill on

either side of it. On the seaward side of the wall, they placed pieces of concrete, vegetation, a wooden boardwalk, and numerous Christmas trees. Appellants admit that they could not have constructed these improvements on the seaward side of the vegetation line as it existed before the hurricane.

The Attorney General filed suit on behalf of the public pursuant to the Open Beaches Act. He alleged that a public easement and right of use existed on the seaward side of the natural vegetation line across appellants' property, and that appellants had encroached upon that right of use by placing structures and objects on the easement.

The district court granted the Attorney General's motion for summary judgment and concluded that:

> (1) The public has acquired through prescription, dedication and custom a right of use or easement to, upon, across and over that portion of the above-described property that is situated and that may come by natural processes to be situated between the line of mean low tide and the natural line of vegetation spreading continuously inland. The area between these two natural boundaries is the beach as defined at common law and in Tex. Nat. Res. Code §§ 61.001-61.025.
>
> (2) This public right of use or easement lies seaward of the natural line of vegetation and is for the free and unrestricted right of passage on and over the beach to and from the waters of the Gulf of Mexico and for travel as a public way parallel to the Gulf waters, and for free and unrestricted lawful use and enjoyment for swimming, fishing, boating, camping, beachcombing, and similar recreational activities.

> (3) This public right of use or easement migrates and moves landward or seaward with the natural movements of the natural line of vegetation and the line of mean low tide. This easement adheres at all times to the shore and follows the line of mean low tide and the natural line of vegetation where ever those two lines may be located by the natural processes at any given time.

The court further found that appellants caused "obstructions, barriers, restraints, and interferences in the public beach easement recognized by this judgment, contrary to the common law right of the public" and to Tex. Nat. Rec. Code Ann. to build a new house on their beachfront property in California unless they granted an easement to the public on the land between the historic mean high tide mark which bounded their property and their seawall. The United States Supreme Court found that this scheme constituted a taking and ordered that the Nollans be compensated. The California Coastal Commission sought to *establish* an easement across land belonging to the Nollans in exchange for the permit where no easement had previously existed, unlike the present case, where the court merely *enforced* an already existing public easement established by custom, prescription, or public dedication.

Appellants further claim that the easement is a "regulatory taking," relying on First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 107 S.Ct 2378 (1987). In *First English*, a county implemented a flood plain ordinance which prohibited a church camp from rebuilding structures destroyed by a flood. The question before the Court was whether the "temporary"

regulatory taking of property (between the time of the imposition of the ordinance and the invalidation of the ordinance as unconstitutional) would entitle the landowners to damages. No public easement was involved, and the Court never reached the issue whether the ordinance was an unconstitutional taking. Appellants' reliance on *Nollan* and *First English* is misplaced. We overrule appellants' point of error.

The judgment of the trial court is affirmed.

Marilyn Aboussie, Justice

[Before Chief Justice Shannon, Justices Carroll and Aboussie]

Affirmed

Filed: March 29, 1989

[Published]

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

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RE: Case No. C-8766

STYLE: JOHN ARRINGTON ET UX.
v. JIM MATTOX, ATTORNEY GENERAL

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, Writ Denied.

Respectfully yours,

John T. Adams, Clerk

By /s/ Blanca E. Morin
Deputy

SUBCHAPTER A. GENERAL PROVISIONS

Section 61.001. Definitions

In this chapter:

(1) "Department" means the Parks and Wildlife Department.

(2) "Line of vegetation" means the extreme seaward boundary of natural vegetation which spreads continuously inland.

(3) "Highest wave" means the highest swell of the surf with such regularity that vegetation cannot grow and does not refer to the extraordinary waves which temporarily extend above the line of vegetation during storms and hurricanes.

(4) "Littoral owner" means the owner of land adjacent to the shore and includes anyone acting under the littoral owner's authority.

(5) "Public beach" means any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

§ 61.011. Public Policy

It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public

has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

§ 61.012. Definition

In this subchapter, "beach" means state-owned beaches to which the public has the right of ingress and egress bordering on the seaward shore of the Gulf of Mexico or any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

§ 61.013. Prohibition of Obstructions

(a) It is an offense against the public policy of this state for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively:

(1) to enter or to leave any public beach; or

(2) to use lawfully and legally any public beach or any larger area abutting on or contiguous to a public beach if the public has acquired a right of use or easement to or over the area by

prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) For purposes of this section, "public beach" shall mean any beach bordering on the Gulf of Mexico which extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous right in the public since time immemorial as recognized by law or custom. This definition does not include a beach which is not accessible by a public road or public ferry.

(c) A person who creates, erects, or constructs an obstruction, barrier, or restraint in violation of Subsection (a) of this section is liable to the state for a civil penalty of not less than $50 nor more than $1,000.

(d) This section does not apply to any obstruction, barrier, or restraint placed on an area defined in Subsection (a) of this section by a county under Chapter 63 of this code for the purpose of establishing or reestablishing sand dunes.

Amended by Acts 1979, 66th Leg., p. 1607, ch. 681, § 2, eff. Aug. 27, 1979; Acts 1983, 68th Leg., p. 4818, ch. 850, § 1, eff. June 19, 1983.

1979 Amendment. Designated former text as subsec. (a); in subd. (1) thereof, substituted "public beach" for "state-owned beach *** in the public"; in subd. (a)(2), substituted "public beach or any larger area" for "property" and "a public beach if the public had acquired a right of

use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public" for "the state-owned beach bordering on the seaward shore of the Gulf of Mexico on which the public has acquired a prescriptive right"; and added subsecs. (b) and (c).

1983 Amendment. Added subsec. (d).

§ 61.014. Denial of Access by Posting

(a) As used in this section, "public beach" means the area extending from the line of mean low tide of the Gulf of Mexico to the line of vegetation bordering on the Gulf of Mexico, or to a line 200 feet inland from the line of mean low tide, whichever is nearer the line of mean low tide, if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) Any person who displays or causes to be displayed on any public beach any sign, marker, or warning, or who shall make or have made any written or oral communication which states that the public beach is private property or who states in any other manner that the public does not have the right of access to the public beach in violation of the lawful access rights of the public guaranteed by this subchapter, shall be fined not less than $10 nor more than $200.

(c) Each day that the communication is made constitutes a separate offense.

(d) Any person who violates the provisions of this section shall be prosecuted in the county in which the public beach is located.

(e) This section does not apply to any island or peninsula that is not accessible by public road or common carrier ferry facility so long as the condition exists.

§ 61.015. Satisfaction of Ingress and Egress Requirement

The requirement of free and unrestricted right of ingress and egress over an area landward of the line of vegetation is considered fully satisfied by access roads or way which are in existence now and available to the public or which by or with the approval of any governmental authority having jurisdiction may be provided in the future.

§ 61.016. Boundaries for Areas With No Marked Vegetation Line

(a) To determine the elevation reached by the highest waves of the Gulf of Mexico, in any area in which there is no clearly marked vegetation line (for instance, a line immediately behind well-defined dunes or mounds of sand and at a point where vegetation begins) recourse shall be to the nearest clearly marked line of vegetation on each side of the unmarked area.

(b) The "line of vegetation" for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side.

(c) If the elevation of the two points on each side of the area are not the same, the extension defining the line reached by the highest waves of the Gulf shall be the average elevation as between the two points, but if there is no clearly marked line of vegetation, the extended line shall not extend inland further than 200 feet from the seaward line of mean low tide.

§ 61.017. Line of Vegetation Unaffected by Certain Conditions

(a) The "line of vegetation" is not affected by the occasional sprigs of salt grass on mounds and dunes or seaward from them and by artificial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area.

(b) If the changes listed in Subsection (a) of this section are made and the vegetation line is obliterated or is created artificially, the line of vegetation shall be determined in the same manner as in those areas covered by Section 61.016 of this code, but if there is a vegetation line consistently following a line more than 200 feet from the seaward line of mean low tide, the 200-foot line shall constitute the landward boundary of the area subject to public easement until a final court adjudication establishes the line in another place.

§ 61.018. Suit to Remove Obstructions

(a) The attorney general or any county attorney, district attorney, or criminal district attorney shall file in a district court of Travis County, or in the county in

which the property is located, a suit to obtain either a temporary or permanent court order or injunction to remove any obstruction or barrier or to prohibit any restraint or interference which restricts the right of the public, individually or collectively, to free and unrestricted ingress and egress to and from any area described in Section 61.012 of this code or any property abutting on or contiguous to the state-owned beach on which the public has acquired a prescriptive right.

(b) In the same suit, the attorney general, county attorney, district attorney, or criminal district attorney may seek recovery of the costs of removing any obstruction or barrier if it is removed by public authorities pursuant to an order of the court.

§ 61.019. Declaratory Judgment Suits

(a) A littoral owner whose rights are determined or affected by this subchapter may bring suit for a declaratory judgment against the state to try the issue or issues.

(b) Service of citation on the state shall be made by serving the citation on the attorney general.

§ 61.020. Prima Facie Evidence

In a suit brought or defended under this subchapter or whose determination is affected by this subchapter, a showing that the area in question is located in the area from mean low tide to the line of vegetation is prima facie evidence that:

(1) the title of the littoral owner does not include the right to prevent the public from

using the area for ingress and egress to the sea; and

(2) there is imposed on the area, subject to proof of easement, a prescriptive right or easement in favor of the public for ingress and egress to the sea.

§ 61.021. Area Not Covered by Subchapter

None of the provisions of this subchapter apply to beaches on islands or peninsulas that are not accessible by a public road or ferry facility for as long as the condition exists.

§ 61.022. Exemption for Certain Structures

The provisions of this subchapter do not prevent any agency, department, institution, subdivision, or instrumentality of this state or of the federal government from erecting or maintaining any groin, seawall, barrier, pass, channel, jetty, or other structure as an aid to navigation, protection of the shore, fishing, safety, or other lawful purpose authorized by the constitution or laws of this state or the United States.

§ 61.023. Effect on Land Titles and Property Adjacent to and on Beaches

The provisions of this subchapter shall not be construed as affecting in any way the title of the owners of land adjacent to any state-owned beach bordering on the seaward shore of the Gulf of Mexico or to the continuation of fences for the retention of livestock across sections

of beach which are not accessible to motor vehicle traffic by public road or by beach.

§ 61.024. Effect of Subchapter on Definition of Public Beach

None of the provisions of this subchapter shall reduce, limit, construct, or vitiate the definition of public beaches which has been defined from time immemorial in law and custom.

No. 89-932

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

****

JOHN AND DOROTHY ARRINGTON,
Petitioners,

v.

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS,
Respondent.

****

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD DISTRICT OF TEXAS, SITTING AT AUSTIN, TEXAS

****

RESPONDENT'S BRIEF IN OPPOSITION

****

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January 4, 1990

QUESTION PRESENTED FOR REVIEW

Whether the migratory, common law boundary of a littoral public easement effects an unconstitutional taking of property when natural processes move the boundary landward.

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No. 89-932

IN THE
SUPREME COURT OF THE UNITED STATES

****

JOHN AND DOROTHY ARRINGTON,
Petitioners,

v.

JIM MATTOX, ATTORNEY GENERAL OF TEXAS, ON BEHALF OF THE PEOPLE OF TEXAS,
Respondent.

****

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD DISTRICT OF TEXAS, SITTING AT AUSTIN, TEXAS

****

RESPONDENT'S BRIEF IN OPPOSITION

****

Respondent Jim Mattox, Attorney General of Texas, on behalf of the people of Texas, hereby submits his brief in opposition to the petition for a writ of certiorari, which seeks review of a decision of the Texas Court of Appeals in this case.

OPINION BELOW

The opinion of the Texas Court of Appeals, Third Supreme Judicial District, sitting in Austin, Texas, is reported at 767 S.W.2d 957 (Tex.Ct.App. -- 1989, writ

denied). The version of the opinion appearing at petitioners' appendix, pp. App. 2 -- App. 5, omits two full paragraphs and portions of two other paragraphs from the court's published opinion. The court of appeals' opinion appears in its entirety in the appendix to respondent's brief at pp. A-7 -- A-10.

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. §1257(3) [sic]. Respondent assumes petitioners rely on 28 U.S.C. §1257(a). For the reasons set forth below, this Court should exercise its discretion under the statute to deny petitioners' request for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners invoke the "taking" provision of the Fifth Amendment to the United States Constitution, which they set forth at page 2 of their petition. Petitioners also discuss certain provisions of what is commonly referred to as the "Texas Open Beaches Act," TEX.NAT.RES.CODE ANN. §§61.001-61.025, which petitioners set forth in the appendix of their petition at pp. App. 7 -- App. 15. Respondent also discusses some of these provisions of the statute. Accordingly, the act, as constituted at the time this lawsuit was initiated below, is fully set forth in Appendix A to this brief, pp. A-1 -- A-6.

STATEMENT OF THE CASE

This case concerns the constitutionality under the federal Taking Clause of a Texas common law public easement having migratory boundaries along the Texas coast. At its core, this case is a common law property rights dispute between a dominant estate

(littoral public easement) and a servient estate (littoral title).

The site of this legal tug of war is also the location of a natural tug of war between the land and the sea: the barrier island beaches along the Gulf of Mexico coast. This particular case arises on Galveston Island off the upper Texas mainland.

Galveston Island was formed in the late Pleistocene Period, when rising sea level caused the Texas shoreline to retreat and partial erosion of the headlands formed sediment that accreted to create a barrier island. The City of Galveston, at least its more densely urbanized portion, occupies the east end of the island, protected from the Gulf of Mexico by a massive seawall constructed to save the city following the devastating hurricane of 1900. Extending west from the west end of the seawall to San Luis Pass, a distance of approximately 20 miles, lies that portion of Galveston Island known as "West Beach." West Beach is a more sparsely developed portion of the island, partially subdivided into lots supporting beach houses used primarily as rental properties, vacation homes and retirement homes.

Since at least 1840, the dry beach portion of the Gulf beach along West Beach, i.e. that area between the line of vegetation[1] and the line of mean high tide,

---

[1]The "line of vegetation" is generally understood to be the landward boundary of the natural and legal beach. *See, e.g., Seaway Co. v. Attorney General*, 375 S.W.2d at 939; *Feinman v. State*, 717 S.W.2d 106, 111-112 (Tex.Ct.App. -- 1986, writ ref'd n.r.e.). It is defined, for statutory purposes under the Open Beaches Act, as "the extreme seaward boundary of natural vegetation which spreads continuously inland." TEX.NAT. RES.CODE ANN. §61.001(2).

has been in private ownership.[2] *Seaway Co. v. Attorney General*, 375 S.W.2d 923, 928 (Tex.Ct.App.-- 1964, writ ref'd n.r.e.) However, since before 1840, the general public has freely used the privately owned dry sand beach along West Beach as a public road and for numerous recreational activities. *See id.* at 931-939. Public use of West Beach has been generally bounded by the vegetation line on the landward side and the water's edge on the seaward side. This long-standing public use has ripened under Texas common law into an easement or right of use and access over the privately owned dry sand beach along West Beach. *Matcha v. Mattox*, 711 S.W.2d 95 (Tex.Ct.App.--1986, writ ref'd n.r.e.), *cert. denied*, 481 U.S. 1024 (1987); *Feinman v. State*, 717 S.W.2d 106 (Tex.Ct.App.--1986, writ ref'd n.r.e.); *Seaway Co. v. Attorney General*, 375 S.W.2d 923.

Characteristic of their barrier island heritage, both the vegetation line and the tide lines on West Beach are dynamic. On a daily basis, the beach widens and narrows with the fluctuations of the tides. After erosive storms,[3] the beach widens as a result of vegetation line erosion and gradually narrows between storms as vegetation colonizes seaward. Over a longer period of time, the beach corridor itself on West Beach has migrated in a landward direction, i.e. has eroded,

---

[2]In 1840 the littoral uplands along West Beach were patented out of the Republic of Texas to Edward Hall and Levi Jones. The "wet beach," that portion of the beach seaward from the mean high tide to the mean low tide, was retained and is today part of the State of Texas' submerged lands.

[3]Approximately 50 hurricanes and tropical cyclones have affected Galveston Island since 1900, most notably the unnamed hurricane of 1900 which established itself as the worst natural disaster in United States history after leaving 6000 island residents dead or missing in its wake.

as both the vegetation line and the tide lines have lost ground on a net basis over the course of many storms and seasonal fluctuations. The foreseeable trend on West Beach calls for continued net erosion, owing to the combined influence of sediment supply deficit, sea level rise, and storms.

Continuous and unobstructed public use of West Beach has attended the historical movements of the beach. The public has freely used the beach landward to the vegetation line at all times: before storms, after storms, and in between storms. The long-standing community understanding about the use of the area seaward of the vegetation line is that the public has always had a right to be there. *Matcha v. Mattox*, 711 S.W.2d at 99; *Feinman v. State*, 717 S.W.2d at 111-114.

Along this strip of dynamic real estate, petitioners purchased a beachfront property: unimproved Lot 9, Section 1, Bermuda Beach Subdivision, on West Beach. Later, petitioners constructed a house on the lot, facing the Gulf of Mexico. The structure was erected just landward of the then-existing location of the vegetation line.

At mid-hurricane season in August 1983, a good portion of petitioners' lot actually became a part of the beach when Hurricane Alicia eroded the vegetation line landward across the lot. Thereafter, on the seaward side of their lot, petitioners erected a wooden bulkhead, a kind of retaining wall. On top of this bulkhead petitioners then added a chain link fence and a locked gate. They further placed sand fill on both sides of the bulkhead. On the seaward side of the bulkhead they placed concrete pieces, vegetation, a wooden boardwalk, and discarded Christmas trees. All of these objects were placed seaward of the natural line of

vegetation.[4] The Arringtons continue to use and occupy a beach house on Lot 9.

Respondent filed suit in Travis County, Texas, district court for declaratory and injunctive relief for removal of petitioners' obstructions in the public easement. Suit was brought by respondent under authority provided in Section 61.018 of the Texas Open Beaches Act, TEX.NAT.RES.CODE ANN. §§61.001-61.025. This statute, adopted in 1959, authorizes the Attorney General, or certain other designated public attorneys, to protect the public beach easement from encroachment. The act neither creates nor acquires any public beach rights but only recognizes those rights on the privately owned dry beach which have been perfected by the public at common law. See TEX.NAT. RES.CODE ANN. §61.012; *State v. Markle,* 363 S.W.2d 332, 336 (Tex.Ct.App.--1962, no writ); *Seaway Co. v. Attorney General*, 375 S.W.2d at 930; *Moody v. White*, 593 S.W.2d 372, 377 (Tex.Ct.App.--1979, no writ).

The district court entered a summary judgment finding that the public had acquired an easement for free and unobstructed use and access to the area from the natural vegetation line seaward to the line of low tide, based upon common law custom, implied dedication, and prescription.[5] Further, the Court concluded

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[4]Petitioners imply at p. 3 of their petition that they were enjoined by the trial court to remove things placed entirely within the boundaries of their lot. Actually, the materials dumped by petitioners on the beach seaward of their new bulkhead were placed not on their own lot but on the property of another private littoral owner, not a party to this appeal.

[5]Petitioners admitted in the district court the existence of the public beach easement on West Beach. However, they disputed its migratory nature and asserted that the easement boundary remains somewhere seaward of their seaward property line.

that this public easement is migratory, moving with the natural movements of the vegetation line and the low water's edge. Thus, finding that petitioners' bulkhead and other items encroached upon the public easement seaward of the natural vegetation line, the district court ordered them removed and prohibited any construction or reconstruction seaward of the natural line of vegetation.

Petitioners appealed to the Texas Court of Appeals, Third Supreme Judicial District sitting in Austin, which affirmed the judgment of the trial court. Noting the common law basis of the public's beach easement, the court of appeals overruled petitioners' sole point of error asserting that the district court judgment effected an unconstitutional taking of their property without just compensation. *Arrington v. Mattox*, 767 S.W.2d at 957-958. The Supreme Court of Texas denied petitioners' application for a writ of error, and thereupon petitioners applied to this Court for a writ of certiorari.

In summary, petitioners ask this court to resolve a controversy arising when two coastal property interests collide, literally as well as legally. Petitioners contend that the Taking Clause of the Fifth Amendment prevents the public beach easement from migrating landward with its natural landmark, the line of vegetation. Respondent contends that the public beach easement extends landward to the natural line of vegetation, whatever its current location, and that state court recognition of this common law migratory characteristic does not offend the Taking Clause.

SUMMARY OF ARGUMENT

The petition for writ of certiorari raises no substantial federal question. The naturally migratory public beach easement adjudicated below derives from

state common law, particularly the real property doctrines of custom, implied dedication and prescription. No basis exists for substituting for state law any federal common law or a federal rule of decision to define the nature of this property right.

Neither does adjudication of this property right raise any substantial question of a "taking" of property in violation of the Fifth Amendment to the United States Constitution. Both the existence of the public easement and its migratory nature stem from state common law principles which recognize the historic custom and usage attending West Beach. *Matcha v. Mattox*, 711 S.W.2d at 98-100. Moreover, Texas coastal property law provides for a migratory title boundary at the shoreline. *State v. Balli*, 190 S.W.2d 71 (Tex. 1944), *cert. denied*, 328 U.S. 852 (1946). A migratory easement boundary along the dry beach is but a physical and legal adjunct to a migratory title boundary along the wet beach. *Matcha v. Mattox*, 711 S.W.2d at 100; *Feinman v. State*, 717 S.W.2d at 110.

Required departure from the migrating vegetation line as the landward boundary of the West Beach easement would engender confusion, inequity, and loss of the easement itself. By visibly delineating the landward extent of the physical beach itself, the natural line of vegetation has always functioned as a readily discernible marker of the landward limit of the public beach as well. Departure from a current, visible line of vegetation would unnecessarily render the daily location of the public use boundary pure guesswork. *Feinman v. State*, 717 S.W.2d at 111.

Petitioners argue that the public easement is fixed in place, or alternatively, that the easement may constitutionally migrate only seaward with accretion but not landward with erosion. Adoption of either of

these approaches would eliminate the natural equities built into the law of migratory coastal boundaries. Under the established Texas law of accretion and erosion, a littoral owner may either gain coastal property or lose it, as natural processes move the shoreline landward and seaward. Adoption of a migrating boundary only in the event of accretion would allow petitioners to obtain all the benefit but risk none of the burden of coastal property ownership. A static beach easement would also be unfair, being lost entirely either under the waves of the Gulf of Mexico as the beach erodes or under the advancing vegetation of the littoral upland as the beach accretes.

Petitioners' view of the Taking Clause would convert every state common law erosion case into a compensable federal claim. In coastal jurisdictions where sea level rise and coastal erosion are looming problems, state and local governments would be made to follow the landward drift of the shoreline with constitutionally required compensation. Under petitioners' line of reasoning, the Taking Clause is a shield to protect landowners from the forces of nature.

REASONS THE WRIT SHOULD BE DENIED

I.

Adjudication of the common law public beach easement on West Beach, Galveston Island raises no substantial or important federal question.

A.

The public beach easement complained of by petitioners derives from the Texas common law of property rights along the state's dynamic Gulf of Mexico coast. As a product of state property law,

neither the creation of the public beach easement nor its migratory nature raises a federal question.

The trial court below found that the public enjoys a migratory easement for unobstructed passage and recreation on the "dry beach" portion of West Beach under three separate state common law doctrines: custom, implied dedication, and prescriptive right. On appeal to the Texas Court of Appeals, petitioners challenged the constitutionality of such an easement or right. This contention had been previously raised and decided adversely to beachfront landowners in the related case of *Matcha v. Mattox*, 711 S.W.2d 95 (Tex.Ct.App.--1986), *cert. denied*, 481 U.S. 1024 (1987). On the basis of *Matcha*, in part, the court of appeals affirmed. In *Matcha*. the same court of appeals had noted that there was no doubt that the long-standing public use of the dry beach had given rise to the public's easement under the ancient doctrine of custom. *Id*. at 99. Further, the ambulatory nature of the public easement was viewed as particularly " . . . compatible with the doctrine of custom and the situations that often give rise to a custom." *Id.* at 100. By its denial of the petitioners' application for a writ of error, the Supreme Court of Texas found no reversible error with this assessment of common law property rights on West Beach.

State law controls the nature of the underlying property rights in this case. No basis exists for invoking or substituting any federal law principles to define the coastal property rights herein, as was done, for example, in *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982) or in *Hughes v. Washington*, 389 U.S. 290 (1967). Petitioners point to no incident of title or fact situation calling for a determination of property under federal common law. Neither does the easement boundary disputed herein,

the natural line of vegetation, demark any interstate or international boundary, thereby triggering possible federal concerns. Thus, Texas law controls the nature of the public beach easement in question. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363 (1977); *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935). The pertinent state law is the common law of Texas, which recognizes a public easement on the beach that may migrate with the natural fluctuations of its monuments: the vegetation line and the low tide line. *Matcha v. Mattox*, 711 S.W.2d 95 (Tex.Ct.App. -- 1986, writ ref'd n.r.e.), *cert. denied,* 481 U.S. 1024 (1987); *Feinman v. State*, 717 S.W.2d 106, 108-111 (Tex.Ct.App. -- 1986, writ ref'd n.r.e.).

B.

Petitioners assert one federal basis in their attack on the West Beach public easement. They claim the easement constitutes a "taking" of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

Neither the creation of the public beach easement nor its dynamic nature unconstitutionally takes property. The common law principles upon which rests the public beach right in Texas -- custom, implied dedication, and prescription -- are the legally recognized means by which individuals may gain rights in another's property. Thus Texas courts have given little credence to arguments that judicial recognition of the existence of the easement offends constitutional prohibitions against governmental takings without compensation.[6] *See Arrington v. Mattox*, 767 S.W.2d at

[6]Petitioners imply that Texas courts have declined to address the taking issue. To the contrary, this issue has been met and dispatched as without merit.

958; *Matcha v. Mattox*, 711 S.W.2d at 101; *Seaway Co. v. Attorney General*, 375 S.W.2d at 930; *Moody v. White*, 593 S.W.2d at 379-380; *accord United States v. St. Thomas Beach Resorts, Inc.*, 386 F.Supp. 769, 772 (D.V.I. 1974), *aff'd mem.*, 529 F.2d 513 (3d Cir. 1975) (rejecting a taking challenge to the Virgin Islands Open Shoreline Act, similarly worded to the Texas Open Beaches Act); *Hay v. Bruno*, 344 F.Supp. 286, 288-290 (D. Ore. 1972) (rejecting a taking challenge to the Oregon equivalent of the Texas Open Beaches Act).

The natural amenability of the beach easement to shorefront dynamics is inherent in the common law creation of the right, at least regarding the West Beach easement. The public has freely used, and littoral property owners have freely made available, all of the privately owned dry sand beach landward to the natural line of vegetation, whatever the location of the vegetation line at any point in time, regardless of storms. The very custom itself on West Beach has embodied the notion of a migratory public use boundary that corresponds with the natural monuments of the beach. *Matcha v. Mattox*, 711 S.W.2d at 100; *Feinman v. State*, 717 S.W.2d at 108-110, 113.

The migratory nature of a coastal *easement* boundary is no different legally than the migratory nature of a coastal *title* boundary. Texas adopts the familiar coastal property rule whereby the title boundary, the line of mean high tide, is subject to movement with the natural processes of erosion and accretion. Thus loss of privately owned littoral uplands to state-owned submerged lands beneath the sweep of the tide is simply a noncompensable loss to the littoral property owner. *State v. Balli*, 190 S.W.2d 71, 100 (Tex. 1944), *cert. denied*, 328 U.S. 852 (1946); *City of Corpus Christi v. Davis*, 622 S.W.2d 640 (Tex.Ct.App. -- 1981,

writ ref'd n.r.e.); *Lakefront Trust, Inc. v. City of Port Arthur*, 505 S.W.2d 606 (Tex.Ct.App. -- 1974, writ ref'd n.r.e.); *City of Port Isabel v. Missouri Pacific R. Co.*, 729 S.W.2d 939, 942-943 (Tex.Ct.App. -- 1987, writ ref'd n.r.e.). Under Texas law, the movement of the public beach easement boundary is a legal parallel to the movement of the title boundary.

Petitioners cite no authority invalidating a common law public easement under the federal Taking Clause. Their claim is without support.

C.

Petitioners attempt to raise a colorable federal taking claim by pointing to the Texas Open Beaches Act and asserting that it is legislative fiat, rather than common law adjudication, which provides the public with a use and passage easement along the Texas Gulf coast. They would have this Court believe that adoption of the Open Beaches Act substantially modified Texas common law. This depiction of the act is erroneous.

The Open Beaches Act itself purports only to protect those rights over the privately owned dry beach which have been gained under state common law. *See* TEX.NAT.RES.CODE ANN.§§61.001(5), 61.011, 61.012. Accordingly, the statute has always been viewed as merely providing a procedural mechanism for protecting such common law rights in the public through litigation by designated governmental attorneys. *State v. Markle*, 363 S.W.2d 332, 336 (Tex.Ct.App.--1962, no writ); *Seaway Company v. Attorney General*, 375 S.W.2d at 930.

Thus, the Attorney General or the State of Texas appears in open beaches cases only as a nominal party. The real party in interest is the public itself, which has satisfied the common law elements to perfect

the easement. Section 61.018(a) of the Open Beaches Act merely deputizes the Texas Attorney General and other governmental attorneys as "representatives for the public to bring suit." *Seaway Co. v. Attorney General*, 375 S.W.2d at 930. Given requisite standing, any member of the beachgoing public could bring suit at common law to enjoin or remove encroachments to the public's beach easement. Representation of the general public by the Attorney General does not convert the underlying right from a common law easement to a police power creation or requirement.[7]

In straining to manufacture a more substantive import of the Open Beaches Act, petitioners offer a confused and confusing array of contentions that the Texas legislature "altered the rights of the parties from their position at common law."[8] Petition at 11. As respondent understands their argument, petitioners first assert that the act expanded the common law concept of "beach" and that state courts subsequently relied upon such statutory change to find public use rights beyond the state's title boundary at the high tide

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[7]Enforcement of the public beach easement by the Attorney General may arguably constitute the "state action" found in the petitioners' cited authorities at page 10 of their petition. However, such "state action" is merely a threshold determination concerning the applicability of federal constitutional constraints. That state action may be present in the *enforcement* of the public easement does not mean that the initial *acquisition* of the easement was by "state action" or that the enforcement ultimately works an unconstitutional result. None of the cited authorities, although finding state action, even involves a common law public easement, much less holds such an easement unconstitutional.

[8]Petitioners exemplify their confusion in this area of the law by mislabelling the state-owned submerged land between high tide and low tide as the State's "easement" and by interchangeably using the terms "public beach," "shore," "shore line," "public shore," "easement," and "State's easement." Petition at 11, 12.

line. Petitioners begin with the contention that, prior to the Open Beaches Act, Texas courts "defined" the landward limit of the "beach" as the high tide line, thereby precluding any public rights in the private littoral upland.[9]

However, petitioners simply miscomprehend Texas law. Their premise that all public use rights were necessarily limited under Texas common law to the state-owned "wet beach" is not supported by the pertinent cases. In 1956 the Texas Supreme Court put the littoral title boundary at the line of mean high tide for grants from the sovereign made after Texas' adoption of the common law in 1840. *Rudder v. Ponder*, 293 S.W.2d 736 (Tex. 1956). Two years later, the slightly different line of mean higher high tide was adopted as the seaward limit of grants made prior to 1840, under the Spanish and Mexican civil law. *Luttes v. State*, 324 S.W.2d 167 (Tex. 1958). Nothing in these title boundary cases can be read to preclude the operation of common law principles of prescription, dedication, or custom, particularly as these doctrines may be employed to recognize public easements further landward across the beach to the vegetation line. It does not follow that, by stopping state title at the wet beach, Texas courts were thereby making the dry beach

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[9]If a clear common law definition of "beach," as such, existed prior to the adoption of the Open Beaches Act, it is not to be found in the two authorities cited by petitioners at pages 11-12 of their petition. These cases touch upon the nature of a grant of state land along a river [*Dincans v. Keeran*, 192 S.W. 603 (Tex.Ct.App. -- 1917, no writ)] and upon liability under a warranty of title to a tract of submerged land [*Hynes v. Packard*, 45 S.W. 562 (Tex. 1898)]. Neither case discusses "beach" *per se* or purports to define or limit any public rights attainable on private littoral land under common law doctrines such as prescription, dedication or custom.

immune from the common law doctrines of public easements.

Petitioners appear then to argue that the common law distinction between state-owned wet beach and privately owned dry beach was deliberately blurred in the Open Beaches Act. Petitioners assert that by defining statutory terms such as "beach" and "line of vegetation" the legislature *ipse dixit* expanded the public use right from the wet beach onto the privately owned dry beach. Petition at 5, 10, 11-13.

To the contrary, the legislature was careful to preserve this common law distinction. Any public access right landward of the the "state-owned beach" is conditioned upon proof of a right to such area under common law principles such as prescription, dedication or custom. TEX.NAT.RES.CODE ANN. §§61.001(5), 61.011, 61.012; *Seaway Co. v. Attorney General*, 375 S.W.2d at 930; *Feinman v. State*, 717 S.W.2d at 111. Moreover, the act specifically disclaims any intent to affect the title of littoral owners, TEX.NAT.RES. CODE ANN. §61.023, or to obrogate "the definition of public beaches which has been defined from time immemorial in law or custom." TEX.NAT.RES.CODE ANN. §61.024.

Petitioners additionally complain that the Open Beaches Act "substantially modified" the common law by mandating an unreasonable, overly rigid public easement intolerant of "reasonable" obstructions, including, apparently, their own bulkhead, concrete, fence, and locked gate.[10] Petition at 13-14. However,

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[10]For their argument to be anything more than a parochial quarrel with the scope of state easement law, petitioners apparently intend for this complaint to implicate the Taking Clause. How the Constitution is transgressed in this regard is not actually articulated.

the public easements adjudicated under authority of the Open Beaches Act are not materially different from other easements enforced under Texas common law: the easement is the dominant estate and any use by the servient fee title owner which interferes with the exercise of the easement must yield. *City Public Service Bd. of San Antonio v. Karp*, 585 S.W.2d 838, 841 (Tex.Ct.App. -- 1979, no writ); *Gulf View Courts. Inc. v. Galveston County*, 150 S.W.2d 872, 874 (Tex.Ct.App. -- 1941, writ ref'd n.r.e.); *Sheppard v. City and County of Dallas Levee Imp. Dist.*, 112 S.W.2d 253, 255 (Tex.Ct.App. -- 1937, no writ). Moreover, the broad scope of the public beach easement adjudicated on Galveston's West Beach is predicated on the historically broad scope of public use. *Matcha v. Mattox*, 711 S.W.2d at 98-99; *Feinman v. State*, 717 S.W.2d 111-113; *Seaway Co. v. Attorney General*, 375 S.W.2d at 930-939. The Open Beaches Act does not expand upon what the public itself has already acquired.

In a related argument, petitioners assert an unreasonably rigid public beach right in Texas which conflicts with public rights recognized in "some of the sister states."[11] Petition at 18-19. In their sole authority for this proposition, *Matthews v. Bay Head Improvement Ass'n.*, 471 A.2d 355 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984), the New Jersey Supreme Court declared a public right to occupy the privately owned dry sand beach in order to facilitate public enjoyment of the adjacent state-owned wet beach on the Atlantic Ocean coast. According to the New Jersey court, this public right is ancillary to public rights in the state's submerged lands under the public trust doctrine. Id. at 363-366. Petitioners seek refuge in

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[11]Petitioners use the plural but point to only one other state's law, that of New Jersey.

Matthews because the public right recognized therein is limited in its scope: the public and the littoral fee owners share occupation of the dry sand area. *Id.* at 364-366. However, petitioners misapply the *Matthews* decision in many respects.

First, Texas is not constrained to model its common law of easements after the New Jersey common law of public trust, even assuming the public trust doctrine is relevant in this context.[12] The nature and extent of rights under state real property law are matters left for the respective states to develop and administer. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977).

Second, petitioners incorrectly suggest that the *Matthews* court "rejected the concept of prescription" in order to achieve a more balanced accommodation of public and private rights. Petition at 19. A fairer reading of the court's opinion indicates that the common law doctrines of prescription, dedication and custom were passed over not because they are too harsh to littoral owners but because they are too harsh to the public. These conservative doctrines were perceived by the court to be less helpful than the public trust doctrine in analyzing the modern relationship between littoral neighbors: the state and private beachfront owners. 471 A.2d at 365.

Finally, according to petitioners, *Matthews* illustrates that Texas and New Jersey courts have

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[12]The nature of the public easement on Galveston's West Beach is consistent with common law beach easements adjudicated elsewhere. *See, e.g., State ex rel. Thornton v. Hay*, 462 P.2d 671 (Ore. 1969) (enjoining fences and other improvements); *United States v. St. Thomas Beach Resorts, Inc.*, 386 F.Supp. 769 (D.V.I. 1974), *aff'd mem.*, 529 F.2d 513 (3d Cir. 1975) (enjoining a fence).

reached "contradictory constitutional results" in their analyses of the same problem. Petition at 19. Assuming that petitioners refer to the "problem" of recognizing public beach rights consistently with constitutional principles, petitioners again misread *Matthews*. *Matthews* is not a taking case. Nowhere does the *Matthews* court engage in a taking analysis of the public right springing from the state's public trust doctrine. Neither does that court hold the limited nature of the public right to be constitutionally mandated by the Taking Clause.

In this regard, petitioners' reliance on *Matthews* is particularly curious, since the public right recognized in the case would fail petitioners' own taking test. Under *Matthews*, apart from any demonstrated historical precedent, private property is opened to public use for reasonable passage and recreation. This physical invasion by the public is more than the *de minimus* said by petitioners to effect a *per se* unconstitutional taking. Petition at 17.

D.

Even if the beach easement herein is a public right which may be constitutionally recognized as state common law, petitioners nonetheless contend that the easement's migratory nature itself offends the Taking Clause. Petition at 15-17. For this contention petitioners rely on *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

This Court held in *Kaiser Aetna* that the Federal Government's imposition of the federal navigational servitude requiring public access to a private coastal pond was an unconstitutional taking. However, several factors distinguish that case from the instant case.

The source of the asserted public access right in *Kaiser Aetna* was not the common law of property but rather the sovereignty of the Federal Government itself. The United States Army Corps of Engineers was acting in its role as a part of the sovereign government, promoting the attributes of that sovereignty under the Commerce Clause of the United States Constitution. *Id.* at 172-173. Not under consideration in *Kaiser Aetna* were any property rights of the nongovernmental public which were earned individually and collectively at common law.

The factual context of *Kaiser Aetna* also differs substantially from the instant case. In *Kaiser Aetna* it was through the artifice of dredging a channel that the private pond became only minimally connected to the larger body of open public waters. By contrast herein, through the eternal, natural processes of coastal erosion, an entire stretch of shoreline, with an attendant historical easement, is moving landward.[13]

The artificial channelization in *Kaiser Aetna* was accomplished through the acquiescence of the Government itself, the Corps leaving undisturbed at the time of dredging the traditional notion that the pond was indeed a private area. *Id.* at 167. It was not until years later, when the pond owner requested authorization for further dredging in the pond, that the Corps asserted a servitude for public access over the pond as part of that authorization. By contrast herein, under neither Texas law nor action of the Attorney General have the petitioners ever been given reason to believe that they could exclude the public from any area seaward of the natural line of vegetation. Indeed,

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[13]Petitioners themselves acknowledge that the events in the instant case are driven by the "force of nature" as opposed to "governmental action." Petition at 15.

by long-standing local custom, this area has been commonly known as the "public beach." The petitioners' asserted right of exclusivity to the beach could not be unconstitutionally taken from them because these petitioners never had that right in the first place.

Petitioners also cite *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982) and *Nollan v. California Coastal Commission*, ___ U.S.____, 107 S.Ct. 3141 (1987) for the proposition that "imposition" of an easement is a physical invasion which invariably effects an unconstitutional taking. However, in neither case was a common law public easement invalidated on taking grounds.

In *Loretto* a New York state statute required a private property owner to provide access to her apartment building for the installation of cable television facilities. This Court characterized this uncompensated permanent physical occupation of private property as the classic, extreme form of "physical invasion." This particular physical invasion could not constitutionally be authorized by the legislature under the guise of a police power regulation to promote rapid development of a desirable communications system. Not at issue in *Loretto* was any common law right of access by the cable company to the apartment building. By contrast, the Texas Open Beaches Act does not authorize "physical invasions" of coastal properties apart from common law principles. TEX.NAT.RES.CODE §61.012; *Arrington v. Mattox*, 767 S.W.2d at 957-958.

Nollan is similarly distinguishable. As a condition for receiving a building permit to enlarge their beachfront house, the Nollans were required by the California Coastal Commission to dedicate an easement for public passage on the beach seaward of

their improvements. This easement was thus derived not from any common law right but from the regulatory capacity of the California agency to control coastal area land use. This Court did strike down this permit condition as a taking, but not because of an inherent unconstitutionality in governmental exactions of private property dedications. Rather, in that particular situation, the Court deemed insufficient the nexus between the state agency's articulated objective (reduction of visual obstruction to the beach) and the means adopted to achieve that end (imposition of lateral beach access). 107 S.Ct. at 3146-3147. The Court pointed out that with a stronger, more rational link between means and ends, the regulatory agency could have constitutionally forbidden the Nollans from constructing a beach house altogether or could have required them to dedicate public access for closer beach viewing. 107 S.Ct. 3147-3148.

None of petitioners' authorities holds that a common law public easement -- migratory or stationary -- effects an unconstitutional taking. No substantial federal question has been raised.

II.

Departure from the migratory natural line of vegetation as the landward boundary of the public beach easement would cause inequity, confusion, and eventual loss of the easement itself.

A.

Petitioners would invoke the Taking Clause to eliminate the natural equity inherent in the common law rule of migratory coastal boundaries. As set forth above, under Texas law littoral title shifts landward and seaward with the natural movements of the line of mean high tide. *City of Port Isabel v. Missouri Pacific*

R.Co., 729 S.W.2d 939, 942-943 (Tex.Ct.App.--1987, writ ref'd n.r.e.). Thus property purchasers assume the potential of either property loss or property gain when investing in real estate at the edge of the Gulf of Mexico. The migratory easement, like migratory title, incorporates both risks. If the upland owner buys property and the beach accretes, nature shifts the public easement seaward and the littoral owner gains. Conversely, if the beach erodes, nature shifts the public easement landward and the littoral owner loses. This legal mirroring of natural processes implements what is common sense and intuitive: property ownership at the edge of the sea is risky, especially along a barrier beach. Petitioners construe the Fifth Amendment to entitle them to risk only the potential for benefit but never for loss along this dynamic landscape.

B.

Petitioners apparently invoke the Fifth Amendment to invalidate as the public easement boundary any location of the natural vegetation line which happens to run landward of their property lines. Petitioners would apparently have the public and littoral property owners continue to hew to some previous location of the vegetation line, albeit often invisible. Obviously, such a result would lead to confusion as to the boundary of the public beach.

In Texas, the "legal" beach has customarily coincided with the natural beach, that area from the water's edge landward to the line of dense vegetation growth on the upland. The very basis of the vegetation line's ripening under the common law into the landward boundary of the beach easement is that this natural monument has always visibly defined the physical beach. Public use, and landowner acceptance of it, has traditionally been confined to that area, visibly delineated by nature. Thus the natural

boundaries of the beach, by long-standing custom and usage, became the legal boundaries of the public easement precisely because they were "written on the soil." *See, e.g., Seaway Co. v. Attorney General*, 375 S.W.2d at 939. For a beachgoer visiting the beach without aid of surveying sextant and historical records, petitioners' advocated abandonment of the visible natural vegetation line would render the location of the public beach easement pure guesswork. *Feinman v. State*, 717 S.W.2d at 111.

C.

The loss of the migratory character of the public beach easement would spell the loss of the easement itself. On an eroding beach both the vegetation line and the low tide line, the historical boundaries of the natural beach, are by definition moving landward over time. A legally migratory public easement preserves the historical public rights perfected between these two dynamic lines. On the other hand, the static or fixed easement advocated by petitioners will eventually disappear beneath the encroaching waves of the Gulf. *Feinman v. State*, 717 S.W.2d at 111.

Conversely, in an accreting area a static easement will significantly narrow or disappear, as encroaching vegetation consumes it from the landward side of the easement. Moreover, any remaining easement will become physically separated from the Gulf of Mexico. Accreting sand on the seaward side of the easement will shift the high tide line seaward. Texas common law will deliver title to this accretion to the upland owner. However, since this accreted title will be unencumbered with the stationary easement, a strip of privately owned sand will separate the public easement from the water. Thus under petitioners' view the public would retain an easement stuck in densely

vegetated uplands and detached from the sea, which serves nobody's purpose and departs from the historical custom and usage of the Gulf coast beachfront. By contrast, the naturally migratory easement recognized by Texas courts automatically adjusts public rights seaward to follow the natural location of the traditional beach.

D.

If petitioners prevail, the public would be required either to buy back the beach as it migrates landward through erosion or to lose the public easement to the encroaching waters of the Gulf of Mexico. To be logically consistent, the petitioners would also be entitled to just compensation when the line of mean high tide finally moves upon their beachfront property and the State of Texas claims ownership under its long-standing common law rule of migratory coastal title. Petitioners' position holds the potential for converting every littoral or riparian case involving erosion or accretion and public lands into a Taking Clause case. This result would constitute a radical departure from traditional common law principles governing littoral and riparian neighbors.

The implications extend far beyond Texas' shores. Many other parts of the United States coast are similarly experiencing erosion, particularly the barrier beaches of the Atlantic Ocean, where the much publicized, worldwide rise in sea level exerts dramatic influence on gently sloping shorelines. Petitioners' reading of the Constitution to require the public to pay them for the natural consequences of shoreline erosion is literally, as well as legally, unnatural.

CONCLUSION

For the foregoing reasons, the Arringtons' petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Texas Open Beaches Act

TEX.NAT.RES.CODE ANN. §§61.001-61.024

Section 61.001. Definitions

In this chapter:

(1) "Department" means the Parks and Wildlife Department.

(2) "Line of vegetation" means the extreme seaward boundary of natural vegetation which spreads continuously inland.

(3) "Highest wave" means the highest swell of the surf with such regularity that vegetation cannot grow and does not refer to the extraordinary waves which temporarily extend above the line of vegetation during storms and hurricanes.

(4) "Littoral owner" means the owner of land adjacent to the shore and includes anyone acting under the littoral owner's authority.

(5) "Public beach" means any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

§ 61.011. Public Policy

It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the

state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

§ 61.012. Definition

In this subchapter, "beach" means state-owned beaches to which the public has the right of ingress and egress bordering on the seaward shore of the Gulf of Mexico or any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

§ 61.013. Prohibition of Obstructions

(a) It is an offense against the public policy of this state for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively:

(1) to enter or to leave any public beach; or

(2) to use lawfully and legally any public beach or any larger area abutting on or contiguous to a public beach if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) For purposes of this section, "public beach" shall mean any beach bordering on the Gulf of Mexico which extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous

right in the public since time immemorial as recognized by law or custom. This definition does not include a beach which is not accessible by a public road or public ferry.

(c) A person who creates, erects, or constructs an obstruction, barrier, or restraint in violation of Subsection (a) of this section is liable to the state for a civil penalty of not less than $50 nor more than $1,000.

§ 61.014. Denial of Access by Posting

(a) As used in this section, "public beach" means the area extending from the line of mean low tide of the Gulf of Mexico to the line of vegetation bordering on the Gulf of Mexico, or to a line 200 feet inland from the line of mean low tide, whichever is nearer the line of mean low tide, if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) Any person who displays or causes to be displayed on any public beach any sign, marker, or warning, or who shall make or have made any written or oral communication which states that the public beach is private property or who states in any other manner that the public does not have the right of access to the public beach in violation of the lawful access rights of the public guaranteed by this subchapter is liable to the state for a civil penalty of not less than $50 nor more than $1,000.

(c) Each day that the communication is made constitutes a separate offense.

(d) Any person who violates the provisions of this section shall be prosecuted in the county in which the public beach is located.

(e) This section does not apply to any island or peninsula that is not accessible by public road or common carrier ferry facility so long as the condition exists.

§ 61.015. Satisfaction of Ingress and Egress Requirement

The requirement of free and unrestricted right of ingress and egress over an area landward of the line of vegetation is considered fully satisfied by access roads or ways which are in existence now and available to the public or which by or with the approval of any governmental authority having jurisdiction may be provided in the future.

§61.016. Boundaries for Areas With No Marked Vegetation Line

(a) To determine the elevation reached by the highest waves of the Gulf of Mexico, in any area in which there is no clearly marked vegetation line (for instance, a line immediately behind well-defined dunes or mounds of sand and at a point where vegetation begins) recourse shall be to the nearest clearly marked line of vegetation on each side of the unmarked area.

(b) The "line of vegetation" for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side.

(c) If the elevation of the two points on each side of the area are not the same, the extension defining the line reached by the highest waves of the Gulf shall be the average elevation as between the two points, but if there is no clearly marked line of vegetation, the extended line shall not extend inland further than 200 feet from the seaward line of mean low tide.

§61.017. Line of Vegetation Unaffected by Certain Conditions

(a) The "line of vegetation" is not affected by the occasional sprigs of salt grass on mounds and dunes or seaward from them and by artificial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area.

(b) If the changes listed in Subsection (a) of this section are made and the vegetation line is obliterated or is created artificially, the line of vegetation shall be determined in the same manner as in those areas covered by Section 61.016 of this code, but if there is a vegetation line consistently following a line more than 200 feet from the seaward line of mean low tide, the

200-foot line shall constitute the landward boundary of the area subject to public easement until a final court adjudication establishes the line in another place.

§ 61.018. Suit to Remove Obstructions

(a) The attorney general or any county attorney, district attorney, or criminal district attorney shall file in a district court of Travis County, or in the county in which the property is located, a suit to obtain either a temporary or permanent court order or injunction to remove any obstruction or barrier or to prohibit any restraint or interference which restricts the right of the public, individually or collectively, to free and unrestricted ingress and egress to and from any area described in Section 61.012 of this code or any property abutting on or contiguous to the state-owned beach on which the public has acquired a prescriptive right.

(b) In the same suit, the attorney general, county attorney, district attorney, or criminal district attorney may seek recovery of the costs of removing any obstruction or barrier if it is removed by public authorities pursuant to an order of the court.

§ 61.019. Declaratory Judgment Suits

(a) A littoral owner whose rights are determined or affected by this subchapter may bring suit for a declaratory judgment against the state to try the issue or issues.

(b) Service of citation on the state shall be made by serving the citation on the attorney general.

§ 61.020. Prima Facie Evidence

In a suit brought or defended under this subchapter or whose determination is affected by this subchapter, a showing that the area in question is located in the area from mean low tide to the line of vegetation is prima facie evidence that:

(1) the title of the littoral owner does not include the right to prevent the public from using the area

for ingress and egress to the sea; and

(2) there is imposed on the area, subject to proof of easement, a prescriptive right or easement in favor of the public for ingress or egress to the sea.

§ 61.021. Area Not Covered by Subchapter

None of the provisions of this subchapter apply to beaches on islands or peninsulas that are not accessible by a public road or ferry facility for as long as the condition exits.

§ 61.022. Exemption for Certain Structures

The provisions of this subchapter do not prevent any agency, department, institution, subdivision, or instrumentality of this state or of the federal government from erecting or maintaining any groin, seawall, barrier, pass, channel, jetty, or other structure as an aid to navigation, protection of the shore, fishing, safety, or other lawful purpose authorized by the constitution or laws of this state or the United States.

§ 61.023. Effect on Land Titles and Property Adjacent to and on Beaches

The provisions of this subchapter shall not be construed as affecting in any way the title of the owners of land adjacent to any state-owned beach bordering on the seaward shore of the Gulf of Mexico or to the continuation of fences for the retention of livestock across sections of beach which are not accessible to motor vehicle traffic by public road or by beach.

§ 61.024. Effect of Subchapter on Definition of Public Beach

None of the provisions of this subchapter shall reduce, limit, construct [sic], or vitiate the definition of public beaches which has been defined from time immemorial in law and custom.

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

No. 3-88-086-CV

JOHN ARRINGTON, ET UX.,
APPELLANTS

vs.

HONORABLE JIM MATTOX,
ATTORNEY GENERAL OF TEXAS,
ON BEHALF OF THE PEOPLE OF TEXAS,
APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
53RD JUDICIAL DISTRICT
NO. 353,498, HONORABLE HARLEY CLARK,
JUDGE PRESIDING

Appellants John and Dorothy Arrington appeal the granting of a summary judgment by a district court of Travis County in an "open beaches" suit. *See* Tex. Nat. Res. Code Ann. §§ 61.001-61.025 (1978 & Supp. 1989) (the Open Beaches Act). The judgment prohibits appellants from interfering with the public's right of free access over the beach adjacent to their property which is seaward of the natural vegetation line. We will affirm the judgment.

Appellants own a lot and home facing the Gulf of Mexico in the Bermuda Beach subdivision on West Beach, Galveston Island, Texas. In August 1983, Hurricane Alicia struck the Texas coast and moved the vegetation line to a point landward of appellants' property. Appellants then built a wooden bulkhead or retaining wall on the beach in front of their home. They erected a chain link fence and locked gate on top of the

wall and placed sand fill on either side of it. On the seaward side of the wall, they placed pieces of concrete, vegetation, a wooden boardwalk, and numerous Christmas trees. Appellants admit that they could not have constructed these improvements on the seaward side of the vegetation line as it existed before the hurricane.

The Attorney General filed suit on behalf of the public pursuant to the Open Beaches Act. He alleged that a public easement and right of use existed on the seaward side of the natural vegetation line across appellants' property, and that appellants had encroached upon that right of use by placing structures and objects on the easement.

The district court granted the Attorney General's motion for summary judgment and concluded that:

> (1) The public has acquired through prescription, dedication and custom a right of use or easement to, upon, across and over the portion of the above-described property that is situated and that may come by natural processes to be situated between the line of mean low tide and the natural line of vegetation spreading continuously inland. The area between these two natural boundries is the beach as defined at common law and in Tex. Nat. Res. Code §§ 61.001-61.025.
>
> (2) This public right of use or easement lies seaward of the natural line of vegetation and is for the free and unrestricted right of passage on and over the beach to and from the waters of the Gulf of Mexico and for travel as a public way parallel to the Gulf waters, and for free and unrestricted lawful use and enjoyment for swimming, fishing, boating, camping, beachcombing, and similar recreational activities.
>
> (3) This public right of use or easement migrates and moves landward or seaward with the natural movements of the natural line of vegetation and the line of mean low tide. This easement adheres at all times to the shore and follows the line of mean low

> tide and the natural line of vegetation where ever those two lines may be located by the natural processes at any given time.

The court further found that appellants caused "obstructions, barriers, restraints, and interferences in the public beach easement recognized by this judgment, contrary to the common law right of the public" and to Tex. Nat. Res. Code Ann. § 61.018. The court ordered removal of the items placed on the easement, enjoined further activity which restrains or interferes with the public's right to access to and use of the beach area, fined appellants fifty dollars, and ordered them to pay court costs. Finally, the court denied appellants' claim alleging selective enforcement and seeking compensation for the State's unconstitutional taking of their property.

In their sole point of error, appellants complain that the trial court erred in holding that their property was not unconstitutionally taken without compensation. This Court addressed such a claim in Matcha v. Mattox on Behalf of the People of Texas, 711 S.W.2d 95 (Tex. App. 1986, writ ref'd n.r.e.), *cert. denied*, 107 S.Ct. 1911 (1987). In *Matcha*, we held that the landowner's complaint that the "imposition" of an easement upon his property under the Open Beaches Act effected an unconstitutional taking was without merit. The public acquires its easements, not by virtue of the Open Beaches Act, but through prescription, dedication, and custom. This Court recognized and affirmed the public's existing easement across the landowner's property acquired by custom.

Other courts have affirmed the public's right in similar cases, on the basis of implied dedication, Feinman v. State, 717 S.W.2d 106 (Tex. App. 1986, writ ref'd n.r.e.), or prescription, Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964, writ ref'd n.r.e.). These holdings recognize the fundamental distinction between a governmental taking of an easement through an act of sovereignty and judicial recognition of a common law easement acquired through historical public use. The Open Beaches Act does not empower the Attorney General to take rights from an owner of land, but merely furnishes a means for the public to enforce its existing collective rights. *Seaway Co.*, 375 S.W.2d at 930.

Appellants claim Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987), establishes that the judgment in this case is an unconstitutional taking. The Nollans were refused a permit to build a new house on their beachfront property in California unless they granted an easement to the public on the land between the historic mean high tide mark which bounded their property and their seawall. The United States Supreme Court found that this scheme constituted a taking and ordered that the Nollans be compensated. The California Coastal Commission sought to *establish* an easement across land belonging to the Nollans in exchange for the permit where no easement had previously existed, unlike the present case, where the court merely enforced an already existing public easement established by custom, prescription, or public dedication.

Appellants further claim that the easement is a "regulatory taking," relying on First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 107 S.Ct. 2378 (1987). In *First English*, a county implemented a flood plain ordinance which prohibited a church camp from rebuilding structures destroyed by a flood. The question before the Court was whether the "temporary" regulatory taking of property (between the time of the imposition of the ordinance and the invalidation of the ordinance as unconstitutional) would entitle the landowners to damages. No public easement was involved, the Court never reached the issue whether the ordinance was an unconstitutional taking. Appellants' reliance on *Nollan* and *First English* is misplaced. We overrule appellants' point of error.

The judgment of the trial court is affirmed.

Marilyn Aboussie, Justice

[Before Chief Justice Shannon, Justices Carroll and Aboussie]
Affirmed
Filed: March 29, 1989
[Publish]